

**UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK**

JAMES CONTANT, *et al.*,

Plaintiffs,

v.

BANK OF AMERICA  
CORPORATION, *et al.*,

Defendants.

Case No. 17-cv-3139-LGS

(related to No. 13-cv-7789-LGS)

**REPORT OF JAMES BIBBINGS**

May 24, 2019

## **INTRODUCTION AND QUALIFICATIONS**

1. My name is James Bibbings, I am an individual over 18 years of age, of sound mind, and I make this declaration of my own personal knowledge.
2. I graduated from Michigan State University, Eli Broad College of Business, with a Bachelor of Arts degree in Finance. I am the founder and CEO of Turnkey Trading Partners (“Turnkey”) with offices in Chicago, Illinois and Fort Lauderdale, Florida. Turnkey has been in business since November of 2008.
3. Turnkey Trading Partners provides private consulting to commodity, futures, options, retail off-exchange foreign currency (“forex”), digital currency (“Crypto Currency”), and swap brokerage or trading firms. Collectively, the business Turnkey consults are more commonly referred to as the alternative investment or commodity interest industry. Turnkey service offerings, include, among other things, Commodity Futures Trading Commission (“CFTC”) and National Futures Association (“NFA”) regulatory, compliance, and operational consulting. Specific services include, hedge fund, money manager, and brokerage business development, drafting of disclosure and private placement documents, outside office supervisory reviews, industry specific due diligence evaluations for mergers and acquisitions, as well as performance and accounting compilations of varying types. Turnkey has serviced hundreds of customers ranging from individual operations to multi-national banking organizations located around the globe.
4. Turnkey has won numerous industry awards under my direction. These include, but are not limited to Best North American Regulatory Advisory Firm, Best Compliance Firm, Best Consultancy, and Best Global Regulatory Advisory Firm. These awards, in no specific order, were granted to Turnkey by Hedgeweek, CTA Intelligence, Alt Credit, and HFM magazines. Turnkey has won or been short listed for industry awards regularly for our services since 2013.
5. Prior to founding Turnkey, I was employed by the NFA as a supervising and staff field auditor. During my tenure I was involved in approximately one hundred investigative audits of CFTC registrants. During this time I reviewed countless regulatory documents and filings, including a wide range of internal communications documents across the alternative investments industry. I also reviewed thousands of carrying brokerage statements, trade system reports, and other financial documentation related to the industry. Since leaving NFA, I have repeatedly reviewed similar materials in my role with Turnkey.
6. During the time that I worked for NFA, the agency was developing the regulatory framework for the forex industry. Specifically, NFA was the first regulator in the US to have jurisdiction over forex trading activities. Part of my role as an NFA auditor during that period of time was to investigate and document forex dealer member (“FDM”) as well as retail foreign exchange dealer (“RFED”) activities. These efforts assisted NFA and eventually the CFTC in the development of productive regulations for the industry.

7. I have been engaged by Berger Montague PC (“Class Counsel”) to review information and data pertaining to retail and spot forex activities. Class Counsel has asked me to estimate the approximate class size utilizing my expert industry knowledge as well as any publicly available data of which I am aware. I am billing my time for this report at a rate of \$500.00/hour.

### ANALYSIS

8. The brokerage industry, in general, but particularly the forex space, is immensely competitive. Industry participants typically will only publish information about their operations if required by regulation. For this reason, it can be difficult to obtain precise class size information; in other words, information about the number of accounts RFEDs may have been servicing, during a particular period of time.
9. Since October of 2010 (see also paragraph 16), the CFTC has required RFEDs to file large amounts of regulatory data for review. Unfortunately, the CFTC does not directly require RFEDs to report the number of accounts they service. However, the CFTC does publish a monthly FCM Data report, which, among other things, includes an accounting of the total customer funds held on deposit to transact in forex at each RFED.
10. I obtained customer deposit information directly from the CFTC’s website for all retail US forex trading done at all CFTC reporting RFEDs. As of the date of this expert declaration, CFTC data was available beginning in October of 2010 through March 31, 2019<sup>1</sup>. This information is critical to estimate the size of the class. Specifically, forex funds on deposit with RFEDs is highly indicative of the total number of accounts they were servicing at the time the data was reported.
11. To estimate the number of accounts that RFEDs were servicing during the class period, I also had to determine a reasonable average account size value at the RFEDs. To accomplish this I relied upon several pieces of industry information. I also relied on my own experiences as a former regulatory examiner at NFA and as a private consultant with Turnkey.
12. A key piece of published industry data that I am familiar with is a forex presentation and study that was prepared by Citibank. This study is still publicly available and was republished by the European Central Bank (“ECB”)<sup>2</sup>. During January of 2014, Bapi Maitra, a managing director, and Global Head of FX Bank Sales, as well as Institutional E-Commerce Sales for Citibank, presented internal research the bank had completed on the US forex market. The Citibank study concluded, that at the end of 2013, there were approximately 150,000 retail forex traders in the United States. The study also determined

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<sup>1</sup> U.S Commodity Futures Trading Commission; Historical FCM Reports; <https://www.cftc.gov/MarketReports/financialfcmdata/HistoricalFCMReports/index.htm> as well as U.S Commodity Futures Trading Commission; Financial Data for FCMs; <https://www.cftc.gov/MarketReports/financialfcmdata/index.htm>

<sup>2</sup> State of the Retail Foreign Exchange Market; Bapi Maitra, Global Head of FX Bank Sales, Citibank; [https://www.ecb.europa.eu/paym/groups/pdf/fxcg/2301/Retail\\_FX.pdf?8b9766f1bbf56797757c4c2cb391f305](https://www.ecb.europa.eu/paym/groups/pdf/fxcg/2301/Retail_FX.pdf?8b9766f1bbf56797757c4c2cb391f305)

that on average these retail forex traders had an account balance of approximately \$6,600. These are both important data points given Citibank's inside access to market data. It is my opinion that this study is one of, if not the, most reliable and trustworthy studies published on the topic. Moreover, the conclusions of the study generally align with my personal experiences in the industry.

13. Utilizing the available forex funds on deposit data from the CFTC, I was able to generate an average total amount of forex deposits in the United States from October of 2010 through March of 2019.

**Figure 1:**

**Average Forex Assets At RFEDs**

<b>2007</b>	No Data
<b>2008</b>	No Data
<b>2009</b>	No Data
<b>2010</b>	\$637,533,863
<b>2011</b>	\$728,504,370
<b>2012</b>	\$807,111,818
<b>2013</b>	\$633,228,767
<b>2014</b>	\$604,546,415
<b>2015</b>	\$567,339,054
<b>2016</b>	\$513,545,229
<b>2017</b>	\$527,808,211
<b>2018</b>	\$538,201,977
<b>2019</b>	\$588,226,866

14. I then applied a "high, medium, low" approach to determining average forex account deposit size. For my delegated high account size I used \$12,200, or twice the average found by Citibank in the study they had published. Then for my mid-level scenario I utilized Citibank's actual study results of \$6,600. For my assigned small account size I chose \$3,300, one-half of the account size average found in the Citibank study. In determining my account size methodology, I used my industry experience, which also aligned with estimates for average account size at popular forex trading forums. Especially after considering the results of the Citibank study, I came to the conclusion that a range of \$3,300 to \$12,200 would be a reasonable estimate of the average retail forex account size at RFEDs during the class period.

**Figure 2:**

**Estimated Forex Account Size**

Low Estimate	\$3,300
Citibank Study	\$6,600
High Estimate	\$12,200

15. Taking the information from Figure 1, and combining it with the estimates from Figure 2, I was able to produce an average number of accounts held by RFEDs estimate for each year where CFTC RFED data is available. To accomplish this, I divided the average account size estimates into the actual average customer deposit information I obtained from the CFTC.

**Figure 3:**

**Estimated Forex Accounts Held By RFEDs**

	<b>Low</b>	<b>Citibank</b>	<b>High</b>	<b>Average</b>
<b>2007</b>	-	-	-	
<b>2008</b>	-	-	-	
<b>2009</b>	-	-	-	
<b>2010</b>	193,192	96,596	53,128	<b>114,305</b>
<b>2011</b>	220,759	110,379	60,709	<b>130,616</b>
<b>2012</b>	244,579	122,290	67,259	<b>144,709</b>
<b>2013</b>	191,888	95,944	52,769	<b>113,533</b>
<b>2014</b>	183,196	91,598	50,379	<b>108,391</b>
<b>2015</b>	171,921	85,960	47,278	<b>101,720</b>
<b>2016</b>	155,620	77,810	42,795	<b>92,075</b>
<b>2017</b>	159,942	79,971	43,984	<b>94,632</b>
<b>2018</b>	163,092	81,546	44,850	<b>96,496</b>
<b>2019</b>	178,251	89,125	49,019	<b>105,465</b>
			<b>2010-19</b>	
			<b>Average</b>	<b>110,194</b>

16. Figure 3 represents the estimated number of retail forex accounts held by RFEDs over the nearly ten-year period CFTC data is available. During July of 2010 the Dodd Frank Wall Street Reform Act (“Dodd Frank”) was signed into law. Under Dodd Frank, during October of 2010, the CFTC first required all RFEDs to file monthly customer deposit information. Dodd Frank also significantly changed how forex trading was regulated. The changes brought forth by Dodd Frank ultimately reduced the total number of RFEDs operating in the United States. To estimate the number of accounts at RFEDs during the period that no CFTC data is available, December of 2007 through 2009, I chose to use an averaging approach. Based on my experience, and based on the impacts Dodd Frank brought upon the forex industry, it was conservative to use the average estimated number of accounts held by RFEDs over the years 2010, 2011, and 2012 to supplement for the years no data was available from December 2007 through 2009. The years 2010, 2011, and 2012 are the most similar years of forex regulation relative to December 2007 through 2009, the period prior to the impacts of Dodd Frank. The average number of accounts held by RFEDs during the years 2010 through 2012 is 129,877 accounts. I used this figure as the number of accounts held by RFEDs for 2007, 2008, and 2009. *See* Figure 4, specifically the highlighted section, on the following page.

**Figure 4:****Estimated Forex Accounts Held By RFEDs**

	<b>Low</b>	<b>Citibank</b>	<b>High</b>	<b>Average</b>
<b>2007</b>	-	-	-	129,877
<b>2008</b>	-	-	-	129,877
<b>2009</b>	-	-	-	129,877
<b>2010</b>	193,192	96,596	53,128	<b>114,305</b>
<b>2011</b>	220,759	110,379	60,709	<b>130,616</b>
<b>2012</b>	244,579	122,290	67,259	<b>144,709</b>
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<b>2018</b>	163,092	81,546	44,850	<b>96,496</b>
<b>2019</b>	178,251	89,125	49,019	<b>105,465</b>
			<b>2007-2019</b>	<b>114,736</b>
			<b>Average</b>	

17. In the forex industry, accounts open, and then close permanently with relatively high frequency. This may happen for a variety of reasons, such as, investment losses, change in financial circumstances, death, change in trading interests, and poor customer service among other things. The annual loss of accounts is referred to as book “turnover” or “attrition” rate. Based on my experience, I estimate that an RFED’s book would turn over by approximately 10% per year. That is, each year that an RFED operates, it will permanently lose approximately 10% of its account base due to attrition. However, in my experience, RFEDs seek to replace or even exceed the number of accounts they lose to attrition. Attrition is significant to consider because once an account has closed, that account would no longer show up in available CFTC data as a deposit with an RFED. Such an account would then also no longer be represented in the CFTC’s RFED reports although that account should be considered as part of the class. As an example, if in year one, the CFTC data were to reflect RFEDs held 100,000 accounts, and approximately 10% of these accounts were to be lost to attrition over the course of the year, the following year RFEDs would show only 90,000 accounts remaining from year one per the example. However, because RFEDs seek to replace these closed accounts, by signing up new accounts, if the data were to reflect 100,000 accounts in year 2, this would represent that 10,000 new accounts were opened between years 1 and 2. Therefore, when accounts are being added to replace those lost to attrition, in this example, there would have been 110,000 total accounts with RFEDs between years 1 and 2 not simply 100,000 as the CFTC RFED deposit data might suggest. Thus, an adjustment for accounts lost to attrition is required for the class period. *See* Figure 5 on the following page.

**Figure 5:**

<b><u>Estimated Account Attrition By Year</u></b>		
		10%
<b>2007</b>	129,877	12,988
<b>2008</b>	129,877	12,988
<b>2009</b>	129,877	12,988
<b>2010</b>	114,305	11,431
<b>2011</b>	130,616	13,062
<b>2012</b>	144,709	14,471
<b>2013</b>	113,533	11,353
<b>2014</b>	108,391	10,839
<b>2015</b>	101,720	10,172
<b>2016</b>	92,075	9,208
<b>2017</b>	94,632	9,463
<b>2018</b>	96,496	9,650
<b>2019</b>	105,465	10,546
<b>Total</b>		<b>149,157</b>

18. The class consists of persons and entities from Arizona, California, Florida, Illinois, Massachusetts, Minnesota, New York, and North Carolina. Therefore, my class size estimate had to also be adjusted to reflect the location of the class members. Based on information publicly available from the most recent US Census conducted in 2010<sup>3</sup>, the United States has a population of approximately 308,745,538 people. Using the same census data it is possible to determine the pro-rata population of each of the aforementioned states represented by the class. The States represented in the class hold 37.59% of the total US population.

**Figure 6:**

<b><u>State</u></b>	<b><u>Population</u></b>	<b><u>% of US</u></b>
Arizona	6,392,017	2.07%
California	37,253,956	12.07%
Florida	18,801,310	6.09%
Illinois	12,830,632	4.16%
Massachusetts	6,547,629	2.12%
Minnesota	5,303,925	1.72%
New York	19,378,102	6.28%
<u>North Carolina</u>	<u>9,535,483</u>	<u>3.09%</u>
<b>Total</b>	<b>116,043,054</b>	<b>37.59%</b>

<sup>3</sup> United States Census Bureau; State Population Totals and Components of Change 2010-2018; table; <https://www2.census.gov/programs-surveys/popest/tables/2010-2018/state/totals/nst-est2018-01.xlsx>

## CONCLUSION

19. After considering the results of the Citibank study, as well as publicly available CFTC and other government data, and using my experience within the forex industry, I was able to come to an estimate of class size. During the class period RFEDs carried an average of approximately 114,736 accounts (*see* Figure 4). Adjusted for account turnover, roughly 149,157 accounts would have opened and been replaced by RFEDs in the course of nearly 12 years (*see* Figure 5). Combining the average number of accounts maintained by RFEDs during the period, with the total number of accounts turned over by RFEDs due to attrition during the period, I estimate that 263,894 total accounts were held with RFEDs during the class period. This figure then needs to be adjusted to be reflective of the States represented by the class. Those States make up approximately 37.59% of the US population (*see* Figure 6). Applying this 37.59% adjustment to the total accounts serviced by RFEDs during the class period produces an estimated class size of 99,198 accounts.

**Figure 7:**

RFED Accounts		10% Turnover		Total Class		Class Adjustment		Total
114,736	+	149,157	=	263,894	X	37.59%	=	99,198

Dated: May 24, 2019




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James Bibbings